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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

10  
11 BEVERLY THOMAS FOR L.H., ) NO. CV 08-06887-MAN  
12 Plaintiff, )  
13 v. ) MEMORANDUM OPINION  
14 MICHAEL J. ASTRUE, )  
Commissioner of Social Security, )  
15 Defendant. ) AND ORDER  
16 \_\_\_\_\_)

17  
18 On October 27, 2008, plaintiff's mother filed a Complaint on behalf  
19 of her minor daughter ("plaintiff") seeking review of the denial by the  
20 Social Security Commissioner ("Commissioner") of her application for  
21 supplemental security income ("SSI"). On May 6, 2009, the parties  
22 consented to proceed before the undersigned United States Magistrate  
23 Judge pursuant to 28 U.S.C. § 636(c). The parties filed a Joint  
24 Stipulation on July 13, 2009, in which: plaintiff seeks an order  
25 reversing the Commissioner's decision and finding that plaintiff is  
26 disabled and entitled to SSI benefits or, in the alternative, remanding  
27 the matter for a new administrative hearing; and defendant requests that  
28 the Commissioner's decision be affirmed. The Court has taken the

1 parties' Joint Stipulation under submission without oral argument.

2

3 **SUMMARY OF ADMINISTRATIVE PROCEEDINGS**

4

5 On June 14, 1994, plaintiff's mother filed an application for SSI  
 6 on behalf of plaintiff, who was born on March 26, 1994, alleging  
 7 disability based on asthma. (Administrative Record ("A.R.") 82-94.) In  
 8 a favorable decision dated July 1, 1997, Administrative Law Judge Morton  
 9 J. Rubin ("ALJ Rubin") determined that plaintiff was eligible for SSI,  
 10 effective June 14, 1994, based on "severe" chronic pulmonary  
 11 insufficiency. (A.R. 740.) ALJ Rubin found that the severity of  
 12 plaintiff's pulmonary impairment met the criteria of Medical Listing  
 13 103.02(C)(2).<sup>1</sup> (A.R. 741.)

14

15 Following ALJ Rubin's favorable disability determination, the  
 16 Social Security Administration ("SSA") conducted a continuing disability  
 17 review<sup>2</sup> of plaintiff's case and, on February 14, 2002, found that  
 18 plaintiff had medically improved as of February 1, 2002. (A.R. 68-72.)

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20       <sup>1</sup> Medical Listing 103.02(C)(2) refers to "chronic pulmonary  
 21 insufficiency" with "[f]requent need for [n]octurnal supplemental oxygen  
 22 as required by persistent or recurrent episodes of hypoxemia." 20  
 C.F.R. Pt. 404, Subpt. P, App. 1, 103.02(C)(2)

23       <sup>2</sup> When a claimant has been granted benefits, her "continued  
 24 entitlement to such benefits must be reviewed periodically." 20 C.F.R.  
 25 § 416.994a(a); see also 20 C.F.R. § 416.989 ("After we find that you are  
 26 disabled, we must evaluate your impairment(s) from time to time to  
 27 determine if you are still eligible for payments based on disability").  
 To accomplish this, the SSA engages in "continuing disability reviews,"  
 which vary in frequency. 20 C.F.R. § 416.989; Flaten v. Sec'y of Health  
and Human Servs., 44 F.3d 1453, 1460 (9th Cir. 1995). Because a  
 presumption of continuing disability arises once a claimant has been  
 identified as disabled, the Commissioner has the burden of producing  
 evidence to meet or rebut the presumption. See Bellamy v. Sec'y of  
Health and Human Servs., 755 F.2d 1380, 1381 (9th Cir. 1985).

1 Benefits were ceased effective February 1, 2002. (A.R. 68.) Plaintiff  
 2 appealed the SSA's determination. (A.R. 73-77.)

3  
 4 On January 7, 2004, plaintiff and her mother, who were not  
 5 represented by counsel, testified at a hearing before Administrative Law  
 6 Judge Edward Graham ("ALJ Graham"). (A.R. 48-65.) At the hearing,  
 7 plaintiff's mother testified that plaintiff continued to be disabled due  
 8 to her asthma and also alleged that plaintiff experienced educational  
 9 difficulties and trouble with attention and concentration. (A.R. 28,  
 10 56.)

11  
 12 On January 22, 2004, ALJ Graham issued an unfavorable decision.  
 13 (A.R. 27-34.) ALJ Graham found that plaintiff's asthma had medically  
 14 improved, and her asthma no longer met or medically equaled the severity  
 15 of Section 103.02(c)(2) or any other section of the medical listings.  
 16 (A.R. 28.) ALJ Graham also found that neither plaintiff's asthma nor  
 17 her attention deficit hyperactivity disorder ("ADHD") results in an  
 18 "extreme" limitation in any domain of functioning or a "marked"  
 19 limitation in two domains of functioning, and neither impairment  
 20 functionally equals the severity of the listings.<sup>3</sup> (A.R. 33.) ALJ  
 21 Graham determined that plaintiff had not been under a disability at any  
 22 time since February 1, 2002, and the Appeals Council subsequently denied  
 23 plaintiff's request for review of ALJ Graham's decision. (A.R. 4-6,  
 24 33.)

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25  
 26       <sup>3</sup> To functionally equal a listing, a child's impairment must be  
 27 of listing-level severity, meaning it must result in a "marked"  
 28 limitation in two of the domains of functioning described in 20 C.F.R.  
 § 416.926a(g)-(l) or an "extreme" limitation in one of the domains.

1       On April 21, 2005, plaintiff's mother filed a Complaint in this  
2 Court on behalf of plaintiff in Case No. CV 05-2695. On February 3,  
3 2006, pursuant to a stipulation of the parties, the Court entered an  
4 Order remanding the matter for further administrative proceedings.  
5 (A.R. 335-40.) In the stipulated remand Order, the ALJ was directed to  
6 "consider all of the evidence and evaluate the [p]laintiff's symptoms to  
7 determine whether the [p]laintiff's condition medically improved" and  
8 "include a comparison evaluation in the record." (A.R. 337-38.) On  
9 March 28, 2006, the Appeals Council remanded the case to the ALJ for  
10 compliance with the stipulated remand Order. (A.R. 341-42.)  
11

12       On October 17, 2006, plaintiff and her mother, who were represented  
13 by counsel, testified at a hearing before ALJ Graham. (A.R. 680-87.)  
14 ALJ Graham continued the hearing to allow plaintiff to undergo a  
15 consultative medical examination. (A.R. 683.) On October 25, 2007,  
16 plaintiff, her mother, and their counsel appeared before ALJ Graham for  
17 a supplemental administrative hearing. (A.R. 688-709.) ALJ Graham  
18 again continued the hearing, because plaintiff had not yet undergone a  
19 consultative medical examination. (A.R. 686.) On April 2, 2008,  
20 following a consultative examination of plaintiff by Claudine Aguilar,  
21 M.D., plaintiff, her mother, and their counsel attended a final hearing  
22 before Administrative Law Judge Robert Evans ("ALJ"). (A.R. 710-34.)  
23 On June 26, 2008, the ALJ issued an unfavorable decision, in which he  
24 found medical improvement in plaintiff's asthma. (A.R. 289-300.)

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26       ///

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## **SUMMARY OF ADMINISTRATIVE DECISION**

Regarding plaintiff's asthma, the ALJ found that:

As compared with the findings in 1994, [plaintiff] no longer requires nocturnal supplemental oxygen because of recurrent episodes of hypoxemia. There is no evidence of constant wheezing and coughing, frequent emergency room treatments, constant monitoring of the child's medical condition and ongoing symptomatology despite treatment. The treatment regimen does not require multiple medications as well as use of a nebulizer four times a day.

(A.R. 293.)

Regarding plaintiff's alleged mental impairment(s), the ALJ found that plaintiff's ADHD, with which she had been diagnosed since the July 1, 1997 comparison point decision ("CPD"), is "severe," but plaintiff is "not retarded and is not learning disabled," as plaintiff's mother alleges. (A.R. 295.) The ALJ concluded that neither plaintiff's mental health records nor plaintiff's school records: support a finding that plaintiff has a disabling mental condition; or corroborate the "marked" or "extreme" mental limitations alleged by plaintiff's mother. (A.R. 294-95.)

Thus, the ALJ determined that plaintiff's impairments do not meet or medically equal any section of 20 C.F.R. Part 404, Subpart P, Appendix 1, and do not functionally equal any of the impairments listed

1 in the medical listings (20 C.F.R. §§ 416.994a(b)(2), 419.926a and SSR  
 2 05-03p). (A.R. 297.) The ALJ concluded that plaintiff's disability  
 3 ended as of February 1, 2002, and she has not become disabled again  
 4 since that date. (A.R. 299.)

5

6 **STANDARD OF REVIEW**

7

8 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner's  
 9 decision to determine whether it is free from legal error and supported  
 10 by substantial evidence in the record as a whole. Orn v. Astrue, 495  
 11 F.3d 625, 630 (9th Cir. 2007). Substantial evidence is "'such relevant  
 12 evidence as a reasonable mind might accept as adequate to support a  
 13 conclusion.'" *Id.* (citation omitted). The "evidence must be more than  
 14 a mere scintilla but not necessarily a preponderance." Connett v.  
 15 Barnhart, 340 F.3d 871, 873 (9th Cir. 2003). While inferences from the  
 16 record can constitute substantial evidence, only those "'reasonably  
 17 drawn from the record'" will suffice. Widmark v. Barnhart, 454 F.3d  
 18 1063, 1066 (9th Cir. 2006)(citation omitted).

19

20 Although this Court cannot substitute its discretion for that of  
 21 the Commissioner, the Court nonetheless must review the record as a  
 22 whole, "weighing both the evidence that supports and the evidence that  
 23 detracts from the [Commissioner's] conclusion." Desrosiers v. Sec'y of  
 24 Health and Human Servs., 846 F.2d 573, 576 (9th Cir. 1988); see also  
 25 Jones v. Heckler, 760 F.2d 993, 995 (9th Cir. 1985). "The ALJ is  
 26 responsible for determining credibility, resolving conflicts in medical  
 27 testimony, and for resolving ambiguities." Andrews v. Shalala, 53 F.3d  
 28 1035, 1039-40 (9th Cir. 1995).

The Court will uphold the Commissioner's decision when the evidence is susceptible to more than one rational interpretation. Burch v. Barnhart, 400 F.3d 676, 679 (9th Cir. 2005). However, the Court may review only the reasons stated by the ALJ in his decision "and may not affirm the ALJ on a ground upon which he did not rely." Orn, 495 F.3d at 630; see also Connett, 340 F.3d at 874. The Court will not reverse the Commissioner's decision if it is based on harmless error, which exists only when it is "clear from the record that an ALJ's error was 'inconsequential to the ultimate nondisability determination.'" Robbins v. Soc. Sec. Admin., 466 F.3d 880, 885 (9th Cir. 2006) (quoting Stout v. Comm'r, 454 F.3d 1050, 1055-56 (9th Cir. 2006)); see also Burch, 400 F.3d at 679.

## DISCUSSION

Plaintiff alleges the following two issues: (1) whether the ALJ properly reviewed the record and provided a proper comparison to deny ongoing benefits; and (2) whether the ALJ properly considered the witness testimony. (Joint Stip. at 8.) These issues are addressed below, although not in the precise manner presented.

**I. The ALJ's Finding That Plaintiff's Asthma Has Medically Improved Is Supported By Substantial Evidence.**

Medical improvement is defined as "any decrease in the medical severity of your impairment(s) which was present at the time of the most recent favorable decision that you were disabled or continued to be

1 disabled." 20 C.F.R. § 416.994a(c). To determine whether there has  
 2 been medical improvement, the claimant's current condition must be  
 3 compared with the claimant's condition at the time of the most recent  
 4 favorable determination or decision. 20 C.F.R. § 416.994a(b)(1). The  
 5 most recent favorable determination or decision is the latest final  
 6 determination or decision involving a consideration of the medical  
 7 evidence and whether the claimant was disabled or continued to be  
 8 disabled. 20 C.F.R. § 416.994a(c)(1).

9

10 In assessing whether plaintiff's asthma medically improved, the ALJ  
 11 compared plaintiff's medical condition at the time of his decision to  
 12 her medical condition at the time of the July 1, 1997 CPD, which was the  
 13 last date on which plaintiff received a favorable disability decision.  
 14 (A.R. 289-300, 739-41.) After carefully reviewing the record as a  
 15 whole, the Court concludes that the ALJ's finding of medical improvement  
 16 in plaintiff's asthma is supported by substantial evidence.<sup>4</sup>

17

18 In the 1997 CPD, ALJ Rubin determined that, as of June 14, 1994,  
 19 plaintiff's asthma met Childhood Medical Listing 103.02(C)(2), which  
 20 refers to severe "chronic pulmonary insufficiency with frequent need for  
 21 nocturnal supplemental oxygen as required by persistent or recurrent  
 22 episodes of hypoxemia." (A.R. 740.) ALJ Rubin based his favorable  
 23 disability determination on evidence that plaintiff suffered from asthma  
 24 with "constant wheezing, frequent emergency room treatments and still

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26 <sup>4</sup> As discussed below, while substantial evidence supports the  
 27 ALJ's finding that plaintiff's asthma has medically improved since the  
 28 1997 CPD, the extent to which her asthma has medically improved is still  
 unclear, as is the extent to which plaintiff is impaired by her "severe"  
 ADHD and/or alleged learning disability.

1 symptomatic despite a complicated medical regimen" and supplemental  
2 oxygen due to persistent or recurrent episodes of hypoxemia. (A.R. 291,  
3 740.)

4

5 In assessing the extent to which plaintiff's asthma improved since  
6 the 1997 CPD, the ALJ relied on plaintiff's treatment records from  
7 Kaiser Permanente, various consultative examination results, and the  
8 hearing testimony of plaintiff's mother to find medical improvement.  
9 (A.R. 296.) Specifically, the ALJ analyzed the evidence of record and  
10 concluded that:

11

12 As compared with the findings in 1994, [plaintiff] no longer  
13 requires nocturnal supplemental oxygen because of recurrent  
14 episodes of hypoxemia. There is no evidence of constant  
15 wheezing and coughing, frequent emergency room treatments,  
16 constant monitoring of the child's medical condition and  
17 ongoing symptomatology despite treatment. This treatment  
18 regimen does not require multiple medications as well as use  
19 of a nebulizer four times a day.

20

21 (A.R. 293.) A review of the record as a whole supports the ALJ's  
22 finding of medical improvement.

23

24 On January 12, 2002, plaintiff underwent a comprehensive pediatric  
25 consultative examination by Alec Does, M.D. (A.R. 223-28.) Dr. Does  
26 personally examined plaintiff and reviewed her medical records from  
27 Kaiser Permanente from 1996, through 2001. (A.R. 223.) Upon  
28 examination, Dr. Does found plaintiff's lungs to be "clear" to

1 auscultation bilaterally with no wheezes or rhonchi." (A.R. 226.) Dr.  
2 Does noted that plaintiff's last asthma-related emergency room visit was  
3 in 1996, and her last severe asthma attack was in 2001. (A.R. 223.)  
4 Dr. Does also noted that plaintiff has not required any hospitalizations  
5 for her asthma. (*Id.*) Dr. Does concluded that plaintiff's asthma was  
6 "stable clinically."<sup>5</sup>

7

8 On January 30, 2007, plaintiff underwent a second pediatric  
9 consultative examination by Chhaya Agarwal, M.D. (A.R. 642-43.) Dr.  
10 Agarwal examined plaintiff, specifically evaluating her asthma  
11 condition. (A.R. 642.) Upon examination, Dr. Agarwal found "clear  
12 breath sounds" and recommended continued management of plaintiff's  
13 asthma with an albuterol inhaler, advair, and steroids as needed. (A.R.  
14 642-43.) Dr. Agarwal diagnosed plaintiff with "mild to moderate  
15 persistent" asthma and concluded that plaintiff's examination was  
16 "normal." (A.R. 643.)

17

18 On January 24, 2008, plaintiff underwent a third comprehensive  
19 pediatric consultative examination by Claudine Aguilar, M.D. (A.R. 648-  
20 57.) Upon examination, Dr. Aguilar found plaintiff's "lung sounds clear  
21 to auscultation bilaterally with good air entry. There are no wheezes,  
22 ronchi, or rales." (A.R. 650.) Dr. Aguilar opined that plaintiff's  
23 asthma was "exercised-induced and mild-moderate persistent." (A.R.  
24 651.) As part of the consultative examination, radiographs of  
25 plaintiff's chest were taken, and plaintiff underwent a pulmonary  
26 function study to measure the extent to which plaintiff's lungs were

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27       <sup>5</sup> At that time, plaintiff's asthma medications included  
28 albuterol and intal, and occasionally oral prednisone. (A.R. 224.)

1 able to take in and release air. (A.R. 653-54.) Plaintiff's chest  
 2 radiographs were within "normal limits" and showed that plaintiff's  
 3 "lungs [were] clear," and her "pulmonary vascularity [was] normal."  
 4 (A.R. 654.) The pulmonary function study revealed only mild  
 5 obstruction. (A.R. 652-53.) Dr. Aguilar concluded that plaintiff's  
 6 asthma was "clinically stable," and she recommended that plaintiff  
 7 continue her asthma medications.<sup>6</sup> (A.R. 651.)

8  
 9 In addition to the consultative examination results, plaintiff's  
 10 treatment records from Kaiser Permanente support the ALJ's finding that  
 11 plaintiff's asthma had medically improved. For example, as compared  
 12 with the findings in the 1997 CPD, when plaintiff required "frequent  
 13 emergency room visits," plaintiff sought treatment at Kaiser only twice  
 14 in 2002; both times her lungs were described as "clear," and her  
 15 treatment consisted of being provided with albuterol inhaler doses.  
 16 (A.R. 243-44.) In December 2003, plaintiff sought treatment for a fever  
 17 and sore throat, and at the time of treatment, plaintiff's asthma  
 18 condition was described as "rhonchi on and off" without wheezing. (A.R.  
 19 599.) Plaintiff was treated for asthma exacerbation once in October  
 20 2004, once in March 2005, and once in April 2005 (A.R. 590, 593, 596).  
 21 In March 2008, plaintiff's asthma was described by her treating  
 22 physician as "persistent controlled." (A.R. 678.) All in all,  
 23 plaintiff's treatment records since the 1997 CPD show no evidence of  
 24 frequent, severe, or prolonged asthma attacks requiring treatment, but  
 25 instead demonstrate that plaintiff's asthma, while persistent, appears  
 26 to be under good control with her current medications.

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27  
 28 <sup>6</sup> At the time of the examination, plaintiff's asthma medications included advair, albuterol, intal, and QVAR. (A.R. 649.)

1       Much of plaintiff's mother's hearing testimony and statements  
 2 support the ALJ's finding of medical improvement. At the 2004 hearing,  
 3 plaintiff's mother testified that plaintiff has had no recent asthma-  
 4 related hospitalizations or emergency room visits, and plaintiff does  
 5 not see a doctor for her asthma on a regular basis, but is simply  
 6 treated at home. (A.R. 58, 293.) Moreover, unlike the symptoms  
 7 plaintiff exhibited at the time of the 1997 CPD, i.e., suffering from  
 8 "constant and persistent wheezing and coughing," plaintiff's mother  
 9 reported that now plaintiff "occasionally becomes short of breath or  
 10 wheezes after running or exercising for more than 20-30 minutes at a  
 11 time." (A.R. 223, 269.) At the time of the 1997 CPD, plaintiff was  
 12 suffering from severe and frequent asthma attacks despite taking  
 13 multiple medications and using a nebulizer four times a day.  
 14 Plaintiff's mother reported that now plaintiff only has two to three  
 15 asthma attacks per month, with flare ups during the winter months, and  
 16 although she requires daily doses of intal and/or albuterol metered dose  
 17 inhalers after physical activity to control her asthma symptoms, she  
 18 does not require the use of a nebulizer four times a day. (A.R. 58,  
 19 223, 266-67, 293, 717, 727.)

20  
 21       Thus, substantial evidence supports the ALJ's conclusion that  
 22 plaintiff's asthma had medically improved.

23  
 24 **II. Substantial Evidence Supports The ALJ's Finding That Plaintiff's**  
 25 **Asthma No Longer Met Or Medically Equaled Listing 103.02(C)(2), The**  
 26 **Listing Plaintiff Met At The Time Of The 1997 CPD.**

27  
 28       If the ALJ finds medical improvement, he must then determine

1 whether plaintiff's impairment still meets, medically equals, or  
2 functionally equals the same listing that it met, medically equaled, or  
3 functionally equaled at the time of the CPD. 20 C.F.R. § 416.994a. If  
4 it does, then the claimant is still disabled. If it does not, then the  
5 ALJ must determine if the claimant is disabled, pursuant to 20 C.F.R. §  
6 416.924(c) and(d), considering all the impairments that the claimant has  
7 now, including any not present or not considered at the time of the CPD.  
8 20 C.F.R. § 416.994a(b)(3). The ALJ must then determine if the  
9 claimant's impairments meet, medically equal, or functionally equal the  
10 severity of any other impairment listed in 20 C.F.R. Part 404, Appendix  
11 1, Subpart P.

12

13 For the reasons detailed in Section I *supra*, substantial evidence  
14 supports the ALJ's conclusion that plaintiff's asthma medically  
15 improved, to the extent that it no longer met or medically equaled the  
16 requisite elements of Listing 103.02(C)(2). The ALJ's finding is  
17 supported by evidence of record that plaintiff no longer required  
18 "nocturnal supplemental oxygen because of recurrent episodes of  
19 hypoxemia," nor did she continue to suffer from "constant wheezing and  
20 coughing, frequent emergency room treatments, constant monitoring of  
21 [her] medical condition, and ongoing symptomatology despite treatment,"  
22 as she did at the time of the 1997 CPD. (A.R. 293-94, 740.)

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1     III. It Is Unclear Whether Plaintiff's Current Impairments, Considered  
2         Singularly Or In Combination, Meet, Medically Equal, Or  
3         Functionally Equal Another Listing, As The ALJ Failed To Obtain An  
4         Evaluation Of Plaintiff's Case In Its Entirety.

5  
6         Plaintiff argues that the ALJ failed to evaluate the elements of  
7 other listings to determine whether plaintiff's physical and mental  
8 impairments meet, medically equal, or functionally equal a listing other  
9 than Listing 103.02(C)(2). (Joint Stip. at 13.) Since the 1997 CPD,  
10 plaintiff has been diagnosed with ADHD, which the ALJ found to be  
11 "severe," and plaintiff's mother alleges that plaintiff has a learning  
12 disability. (A.R. 56, 292, 296.) The ALJ concluded that neither  
13 plaintiff's mental health records nor plaintiff's school records support  
14 finding a disabling mental condition. (A.R. 294-95.) However, it is  
15 unclear whether plaintiff's asthma, in combination with her "severe"  
16 ADHD and alleged learning disability meet, medically equal, or  
17 functionally equal another Listing, because the ALJ failed to evaluate  
18 the elements of the listings, other than Listing 103.02(C)(2).

19  
20         Further, plaintiff argues that the ALJ erred in his consideration  
21 of the evidence, because the ALJ failed to comply with Howard ex rel.  
22 Wolff v. Barnhart, 341 F.3d 1006 (9th Cir. 2003), in that the ALJ should  
23 have, but failed to, seek medical expert testimony with respect to the  
24 evaluation of plaintiff's case as a whole. (Joint Stip. at 13-14.) Plaintiff  
25 argues that the ALJ's failure to adhere to the holding of  
26 Howard compels remand of this matter to allow the ALJ to "obtain a case  
27 evaluation, based on the record in its entirety, from a pediatrician or  
28 other appropriate specialist, rather than simply constructing his own

1 case evaluation from the evidence in the record." (Joint Stip. at 14,  
 2 citing Howard.)  
 3

4 In Howard, the Ninth Circuit reversed and remanded the decision of  
 5 an ALJ who constructed a case evaluation of his own by analyzing  
 6 existing medical reports of record without obtaining a case evaluation  
 7 of the child plaintiff's case as a whole.<sup>7</sup> Howard, 341 F.3d at 1014.  
 8 The Ninth Circuit held that, while the ALJ's decision was supported by  
 9 substantial evidence,<sup>8</sup> the matter required remand, because the ALJ failed  
 10 to comply with the requirement of 42 U.S.C. § 1382c(a)(3)(i) that the  
 11 ALJ "shall make reasonable efforts to ensure that a qualified  
 12 pediatrician or other individual who specializes in a field of medicine  
 13 appropriate to the disability of the individual (as determined by the  
 14 Commissioner of Social Security) evaluates the case of such an  
 15 individual." *Id.* at 1013. The Ninth Circuit interpreted this statutory  
 16 language to mean that "the ALJ is required to make a reasonable effort  
 17 to obtain a case evaluation, based on the record in its entirety, from  
 18 a pediatrician or other appropriate specialist, rather than simply  
 19 constructing his own case evaluation from the evidence in the record."  
 20 *Id.* at 1014.

21  
 22 Critically, in explaining why the district court erred in its  
 23 interpretation of the statutory language, the Ninth Circuit stated in  
 24

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25       <sup>7</sup> The child plaintiff in Howard was found disabled due to a  
 26 borderline IQ and developmental delays. Howard, 341 F.3d at 1006.

27       <sup>8</sup> The ALJ found, and both the district court and Ninth Circuit  
 28 agreed, that substantial evidence supported the ALJ's finding of medical  
 improvement in the child plaintiff's mental impairments. Howard, 341  
 F.3d at 1012.

1 Howard that:

2  
3 The district court found that the ALJ did not err in failing  
4 to obtain a case evaluation from a qualified expert because  
5 the record was replete with reports from expert physicians who  
6 had examined [the child plaintiff]. *There is a distinction,*  
7 *however, between having an expert evaluate a claimant with*  
8 *respect to that expert's particular specialty, and having an*  
9 *expert evaluate a claimant's case in its entirety, considering*  
10 *all of the medical records and determining whether those*  
11 *indicate that the claimant is disabled within the meaning of*  
12 *the Social Security Act.*

13  
14 341 F.3d at 1014 n.2 (emphasis added).

15  
16 The Ninth Circuit concluded that, despite the numerous medical  
17 reports in the record, *to wit*, reports by a developmental psychologist,  
18 a neuropsychology fellow, a licensed psychologist, a school  
19 psychologist, a registered occupational therapist, a speech/language  
20 therapist, a school psychometrist, a speech/language pathologist, a  
21 child neurologist, a child and adolescent psychiatrist, and a pediatric  
22 cardiologist, the ALJ erred because "he made no effort to have [the  
23 child plaintiff's] case evaluated in its entirety." Howard, 341 F.3d at  
24 1014. Therefore, the Court remanded the matter to allow the ALJ to  
25 obtain a comprehensive "case" evaluation based on the record in its  
26 entirety by the appropriate specialist. *Id.*

27  
28 The facts and circumstances surrounding the ALJ's decision in the

1 instant matter are substantially similar to those in Howard. Here, as  
 2 in Howard, the record contains several consultative reports, medical  
 3 treatment notes, and school records that bear directly plaintiff's  
 4 physical and mental impairments.<sup>9</sup> As in Howard, the ALJ constructed his  
 5 own case evaluation from the evidence in the record, but failed to  
 6 obtain an evaluation of plaintiff's case in its entirety by a medical  
 7 expert or appropriate specialist. In a case such as this one, in which  
 8 a comprehensive evaluation of whether plaintiff's physical and mental  
 9 impairments meet, medically equal, or functionally equal one or more of  
 10 the medical listings is necessary, it is especially important for the  
 11 ALJ to solicit the opinion of a pediatrician or other qualified medical  
 12 expert regarding plaintiff's case as a whole. The ALJ failed to do so  
 13 here.

14

15       Defendant contends that the ALJ complied with Howard, because the  
 16 ALJ obtained and properly relied on two "comprehensive pediatric  
 17 evaluations: the first in January 2002, prior to the cessation of her  
 18 disability benefits (AR 223-28); and another in January 2008, just prior  
 19 to the ALJ decision now at issue (AR 648-51)." (Joint Stip. at 18.)  
 20 However, defendant's contention is based on a misreading of the statute,  
 21 because as the Ninth Circuit made clear in Howard, there is a  
 22 distinction between "having an expert evaluate a claimant with respect  
 23 to that expert's particular specialty, and having an expert evaluate a

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24       <sup>9</sup> The record contains several pediatric consultative reports as  
 25 discussed in Section I *supra*. The record also contains two  
 26 psychological consultative examinations: in December 2001, plaintiff  
 27 was examined by Leslie Roman, Ph.D., who diagnosed plaintiff with ADHD  
 28 and low average intellectual functioning (A.R. 216-22); and in December  
 2006, plaintiff was examined by Ahmad R. Riahinejad, Ph.D., who stated  
 that plaintiff "did not put forth her best effort into the testing" and  
 that she tested within the "malingering range" (A.R. 628-33).

1 claimant's case in its entirety, considering all of the medical records  
2 and determining whether those indicate that the claimant is disabled  
3 within the meaning of the Social Security Act." Howard, 341 F.3d at  
4 1014 n.2.

5

6 In any event, the ALJ should have called a medical expert to  
7 testify at the hearing, because while the ALJ's finding of medical  
8 improvement in plaintiff's asthma is supported by substantial evidence,  
9 the extent to which plaintiff has medically improved, and whether  
10 plaintiff continues to meet another listing taking into consideration  
11 all of plaintiff's impairments, including her "severe" ADHD and alleged  
12 learning disability, remains unclear. Without the guidance of a medical  
13 expert or other qualified medical advisor, the ALJ concluded, in  
14 contravention of Howard, that plaintiff does not have an impairment or  
15 combination of impairments that meet, medically equal, or functionally  
16 equal any of the listings.

17

18 Accordingly, in view of the Ninth Circuit's holding in Howard, this  
19 matter must be remanded for further proceedings to allow the ALJ to seek  
20 medical expert testimony based upon the medical expert's review of the  
21 entire record, rather than upon the ALJ's construction of his own case  
22 evaluation from the existing evidence in the record. Howard, 341 F.3d  
23 at 1014. On remand, with the assistance of a qualified medical expert,  
24 the ALJ shall evaluate the elements of the listings, taking into  
25 consideration all of plaintiff's impairments, including her "severe"  
26 ADHD and alleged learning disability, to determine whether plaintiff's  
27 impairments meet, medically equal, or functionally equal another

28

1 listing, other than Listing 103.02(C)(2).<sup>10</sup>

2

3 **IV. The ALJ Properly Considered The Lay Witness Testimony Of**

4 **Plaintiff's Mother.**

5

6 In evaluating the credibility of a claimant's assertions of  
 7 functional limitations, the ALJ must consider reported observations of  
 8 the claimant by lay witnesses. Stout, 454 F.3d at 1053. "[F]riends and  
 9 family members in a position to observe a claimant's symptoms and daily  
 10 activities are competent to testify as to [the claimant's] condition." Dodrill v. Shalala, 12 F.3d 915, 918-19 (9th Cir. 1993); 20 C.F.R. §  
 11 404.1513(d)(4) ("we may also use evidence from other sources to show the  
 12 severity of your impairment(s) . . . . Other sources include, but are  
 13 not limited to . . . spouses, parents and other care-givers, siblings,  
 14 other relatives, friends, neighbors, and clergy"). "If an ALJ

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17       <sup>10</sup> In his portion of the Joint Stipulation, defendant relies on  
 18 Jamerson v. Chater, 112 F.3d 1064 (9th Cir. 1997), to support the ALJ's  
 19 decision that plaintiff was not disabled. (Joint Stip. at 16.) Defendant contends that the instant case is "factually similar to  
 20 Jamerson v. Chater, a Ninth Circuit case in which the court upheld  
 21 Defendant's decision that a child with asthma, who also alleged a  
 22 learning disability, was not disabled under the Act." (*Id.*) Defendant  
 23 claims that the Ninth Circuit "held that an ALJ's finding that a child  
 24 who spend 90 minutes each day in a special education classroom, but who  
 25 was not failing his classes, constituted substantial evidence in support  
 26 of the ALJ's decision." (*Id.*) While defendant is not entirely incorrect  
 27 in his interpretation of the holding in Jamerson, defendant fails to  
 28 mention the more salient proposition for which Jamerson stands, namely,  
 that a special education teacher is not an "acceptable medical source"  
 within the meaning of the social security regulations, and, thus, should  
 not be regarded as the equivalent of a treating physician. Jamerson,  
 112 F.3d at 1066. While the instant case may be "factually" similar to  
Jamerson with respect to the alleged disabilities, to wit, both  
plaintiffs suffered from asthma and both plaintiffs alleged a learning  
disability, that is where the similarity between the two cases ends.  
Legally, plaintiff has not raised as an issue whether any of plaintiff's  
teachers "should be regarded as the equivalent of a treating physician,"  
as plaintiff did in Jamerson.

1 disregards the testimony of a lay witness, the ALJ must provide reasons  
2 'that are germane to each witness.'" Bruce v. Astrue, 557 F.3d 1113,  
3 1114 (9th Cir. 2009)(citation omitted). Further, the reasons "germane  
4 to each witness" must be specific. Stout, 454 F.3d at 1054 (explaining  
5 that "the ALJ, not the district court, is required to provide specific  
6 reasons for rejecting lay testimony").

7

8 An ALJ may "properly discount lay testimony that conflict[s] with  
9 the available medical evidence" (Vincent v. Heckler, 739 F.2d 1393, 1395  
10 (9th Cir. 1984)), particularly when, as in Vincent, "lay witnesses [are]  
11 making medical *diagnoses*," because "[s]uch medical diagnoses are beyond  
12 the competence of lay witnesses and therefore do not constitute  
13 competent evidence." Nquyen v. Chater, 100 F.3d 1462, 1467 (9th Cir.  
14 1996)(original emphasis). When as here, however, a lay witness  
15 testifies about a claimant's symptoms, such testimony is competent  
16 evidence and cannot be disregarded without comment. *Id.* Under Stout,  
17 "where the ALJ's error lies in a failure to properly discuss competent  
18 lay testimony favorable to the claimant, a reviewing court cannot  
19 consider the error harmless unless it can confidently conclude that no  
20 reasonable ALJ, when fully crediting the testimony, could have reached  
21 a different disability determination." 454 F.3d at 1055.

22

23 Plaintiff contends that the ALJ "discounted" the testimony of  
24 plaintiff's mother. (Joint Stip. at 31.) However, as defendant  
25 correctly notes, the ALJ properly considered plaintiff's mother's  
26 testimony and found that much of her testimony actually supported the  
27 ALJ's finding that plaintiff's condition had medically improved. (Joint  
28 Stip. at 34.)

1       The ALJ accurately summarized the 2004 hearing testimony of  
2 plaintiff's mother as follows:

3  
4       [Plaintiff's] mother complained of her child's poor attention  
5 and concentration, difficulty completing tasks, poor academic  
6 performance due to frequent asthma related absences, the need  
7 to take 10-20 Prednisone pills and use of inhalers and that  
8 her child is hyperactive. Otherwise, the mother testified in  
9 2004 that her child was in regular classes in school, except  
10 for one special education class; that she has never been held  
11 back in a grade in school; that the child takes physical  
12 education classes, but does not fully participate; that she  
13 rides her bicycle and likes to play dodge ball; that the child  
14 has had no recent asthma-related hospitalizations or emergency  
15 room visits; that the child does not take any medication for  
16 ADHD and has not been seen by a mental health provider,  
17 counselor or psychiatrist, that she does not have any  
18 discipline problems at school; that she is able to care for  
19 her hygiene and grooming independently; that she takes no  
20 speech classes; and that she can see okay with glasses.

21  
22 (A.R. 291.)

23  
24       In addition, the ALJ accurately summarized the 2008 hearing  
25 testimony of plaintiff's mother as follows:

26  
27       [Plaintiff's] mother alleges that [plaintiff] continues to be  
28 disabled by her asthma. The witness explain[ed] that

[plaintiff's] morning breathing treatments render her often tardy at school. The mother previously complained that her daughter is disabled due to frequent asthma attacks that require the use of steroids and severely restrict physical activity. In addition[ , ] [plaintiff] is allegedly disabled by educational difficulties, especially in the areas of math and health science. The mother explained that the child is in a resource class in these courses and engages tutors through an after school program. She had previously noted that [plaintiff] has trouble with concentration and attention. The mother was concerned that [plaintiff's] participation in the resource class restricts her choice of elective classes.

(A.R. 291.) Finally, the ALJ noted plaintiff's mother's allegations that plaintiff suffered from "walking and coordination problems" and a "learning disability." (*Id.*)

The ALJ discussed and considered plaintiff's mother's testimony, clearly accepting it in part and properly rejecting it in part. (See A.R. 291, 293, 295-98.) As discussed in Section I *supra*, the ALJ accepted much of the mother's testimony and relied on it to support his finding of medical improvement in plaintiff's asthma condition. As for the testimony rejected by the ALJ, he discussed it and clearly stated that he did not give

weight to the hearing testimony that [plaintiff] has marked and extreme functional limitations, because the statements from [plaintiff] and her mother are not consistent with the

1 information given to the primary care physician, as documented  
2 in the longitudinal treatment record. They are also not  
3 consistent with how the doctor finds [plaintiff] presents  
4 herself at the infrequent follow up evaluations. I am not  
5 bound to accept statements from the mother that are  
6 inconsistent with the longitudinal treatment record.

7  
8 (A.R. 297-98.)  
9

10 A review of the record supports the ALJ's reason for rejecting the  
11 inconsistent testimony of plaintiff's mother regarding her allegations  
12 of plaintiff's marked and extreme functional limitations. See Bayliss  
13 v. Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) ("[i]nconsistency with  
14 medical evidence" constitutes a germane reason for discrediting the  
15 testimony of a lay witness)(citation omitted). Accordingly, the ALJ did  
16 not err in his consideration of the testimony of plaintiff's mother.  
17

18 **V. Remand Is Required.**  
19

20 The decision whether to remand for further proceedings or order an  
21 immediate award of benefits is within the district court's discretion.  
22 Harman v. Apfel, 211 F.3d 1172, 1175-78 (9th Cir. 2000). Where no  
23 useful purpose would be served by further administrative proceedings, or  
24 where the record has been fully developed, it is appropriate to exercise  
25 this discretion to direct an immediate award of benefits. *Id.* at 1179  
26 ("the decision of whether to remand for further proceedings turns upon  
27 the likely utility of such proceedings"). However, where there are  
28 outstanding issues that must be resolved before a determination of

1 disability can be made, and it is not clear from the record that the ALJ  
2 would be required to find the claimant disabled if all the evidence were  
3 properly evaluated, remand is appropriate. *Id.*

4

5 Here, remand is the appropriate remedy to allow the ALJ the  
6 opportunity to remedy the above-mentioned deficiencies and errors. See,  
7 e.g., Benecke v. Barnhart, 379 F.3d 587, 593 (9th Cir. 2004)(remand for  
8 further proceedings is appropriate if enhancement of the record would be  
9 useful); McAllister v. Sullivan, 888 F.2d 599, 603 (9th Cir.  
10 1989)(remand appropriate to remedy defects in the record).

11

12 **CONCLUSION**

13

14 Accordingly, for the reasons stated above, IT IS ORDERED that the  
15 decision of the Commissioner is REVERSED, and this case is REMANDED for  
16 further proceedings consistent with this Memorandum Opinion and Order.

17

18 IT IS FURTHER ORDERED that the Clerk of the Court shall serve  
19 copies of this Memorandum Opinion and Order and the Judgment on counsel  
20 for plaintiff and for defendant.

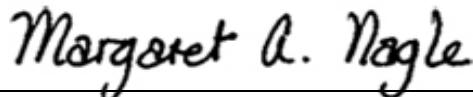
21

22 **LET JUDGMENT BE ENTERED ACCORDINGLY.**

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24 DATED: March 31, 2010

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MARGARET A. NAGLE  
UNITED STATES MAGISTRATE JUDGE